

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7007

United States Court of Appeals

For the Second Circuit

HARTFORD NATIONAL BANK & TRUST COMPANY,
Plaintiff-Appellant

against

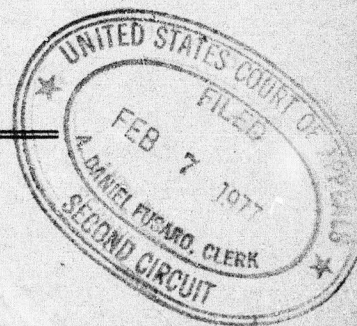
WESTCHESTER FEDERAL SAVINGS & LOAN ASSOCIATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFFS-APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The decision appealed from was rendered by Judge Kevin T. Duffy of the United States District Court for the Southern District of New York.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in denying Plaintiff-Appellant Hartford National Bank and Trust Company ("Hartford") the ownership and possession of funds pledged to Hartford as security for a loan and on deposit with Defendant-Appellee Westchester Federal Savings and Loan Association ("Westchester")?

2. Did the Trial Court err in finding that the pledged funds were fiduciary funds?

3. Were Exhibits A and B properly admitted?

STATEMENT OF THE CASE

Plaintiff ("Hartford") is a national bank with its principal place of business in Connecticut. Defendant ("Westchester") is a national savings and loan association with its home office in New York.

This is a diversity action involving \$44,219.84, together with interest from July 18, 1974, pledged as security for a loan to Hartford and on deposit at Westchester.

STATEMENT OF THE FACTS

In late April, 1971, Herbert Stoll ("Stoll"), the general partner in a limited partnership known as Hyde Park Company, which owned an apartment building in Stamford, Connecticut, approached the Hartford bank seeking a \$35,000.00 loan. William C. Stevens, a Vice President of Hartford, asked Stoll about possible security for the loan. Stoll indicated that he had an account at Westchester and presented to Hartford a Westchester passbook with the name "Hyde Park Company c/o Herbert Stoll" typed thereon (Exhibit 4; Appendix, Pages 83-a to 86-a), said passbook showing one entry: an initial deposit made on April 12, 1971, of \$38,265.00. (Appendix, Page 43-a).

Thereupon Stevens telephoned Westchester to determine the assignability of the account (Appendix, Page 43-a) and upon being advised that said account was assignable, agreed to loan \$35,000.00 to Stoll, requiring from Stoll the delivery of the passbook (Exhibit 4; Appendix, Pages 83-a to 86-a), an undated, signed withdrawal slip (Exhibit 5; Appendix, Page 87-a) and an executed pledge (Exhibit 2; Appendix, Page 81-a).

Hartford thereupon, on April 29, 1971, wrote Westchester (Appendix, Page 44-a; Exhibit 1; Appendix, Page 80-a) requesting that Westchester complete and execute Hartford's form acknowledging receipt of the "Notice of Pledge" (Exhibit 2; Appendix, Page 81-a).

Westchester filled out and executed said forms and returned them to Hartford with a covering letter dated May 21, 1971 (Exhibit 3; Appendix, Page 82-a) stating:

I am returning herewith the receipt of the Notice of Pledge of the above savings account consisting of security rents under leases.

Sometime after the receipt of the Notice of Pledge, Receipt of Notice and covering letter and having in its possession the passbook and withdrawal slips, Hartford advanced \$35,000.00 to Stoll.

Stoll defaulted on the loan, whereupon, on July 18, 1974, Stevens presented the passbook and withdrawal slip to Westchester to obtain receipt of the funds on deposit. Westchester entered the interest in the passbook and then refused to turn over any money from the account to Hartford. (Appendix, Page 48-a).

ARGUMENT

POINT I

THE PLEDGED MONIES WERE NOT FIDUCIARY FUNDS

A. As a matter of law.

The Trial Court incorrectly stated (Appendix, Page 74-a) at page 3 of its Opinion

There is no dispute that the monies in issue are in fact fiduciary funds.

Plaintiff has always insisted that the monies on deposit

were not fiduciary funds. (Appendix, Page 53-a).

Prior to October 1, 1973, there were no laws in Connecticut regarding tenant's security deposits under leases.

Though the Connecticut Courts had never been called upon to consider the character of such security deposits and the relationship of the landlord and tenant in respect thereto, the law in other jurisdictions has been well settled.

In Mallory Associates v. Barving Realty Co., 300 N.Y. 297 (1949), the Court stated at pages 299 to 300:

Prior to the enactment of section 233 of the Real Property Law [providing that security deposits are money of the tenant and shall be held in trust] ... and in the absence of facts from which a contrary intention could be inferred, Matter of Atlas, 217 App. Div. 38, it was uniformly held that a deposit of security by a tenant under a lease created a debtor-creditor relationship and that the landlord had the right to use such money until the date specified for repayment. (Emphasis added).

Therefore, in April, 1971, when the Westchester account was opened and when Hartford made the loan, the monies on deposit with Westchester were the monies of Stoll and Hyde Park Company, were not "fiduciary funds" and were assignable without restriction or limitation. Stoll had the absolute right to pledge said funds to Hartford. Westchester had no right to refuse to turn over the funds when demanded by Hartford, as the assignee thereof.

Westchester could not, under any circumstances, change the legal relationship between the landlord (Stoll) and his tenants, nor create a fiduciary relationship where none existed either in law or fact.

* * *

Westchester's contention has always been, as stated by its counsel at the conclusion of the Trial (Appendix, Page 68-a):

We are adding the money in the account for the benefit of someone ... Whatever the decision of the Court is here, we are stakeholders in substance ...

Though claiming to be merely "stakeholders" and having no interest in the monies it held, Westchester failed to avail itself of the interpleader statutes of either New York (CPLR, Section 1006) or Connecticut (Section 52-484, Connecticut General Statutes). At no time before or at the trial did Westchester offer any testimony in support of its contention that two or more persons were claiming the monies it held in the savings account.

If the decision of the Trial Court is allowed to stand, we have the unusual situation of denying to the rightful owner (the pledgee, Hartford) the ownership, possession and use of its money while leaving Westchester to hold the account as a "stakeholder" for non-existent claimants, benefiting for eternity from the use and possession of the funds.

B. As a matter of fact.

Even if the law were other than stated hereinabove, the facts amply support the conclusion that as a matter of fact, the pledged monies were not fiduciary funds.

Westchester's only witness, Harold C. Hahn, Jr., an Assistant Vice President, in response to the Trial Court's query (Appendix, Page 66-a):

THE COURT: What he [plaintiff's counsel] is asking is, if it is a rent security account, don't you put Hyde Park Company, rent security account, care of Herbert Stoll?

THE WITNESS: I would.

THE COURT: But this passbook doesn't have it, right?

THE WITNESS: It does not.

Westchester failed to put any language of limitation or restriction on the face or body of the passbook, a procedure contrary to that which Westchester's witness testified would normally be followed (Exhibit 4; Appendix, Pages 83-a to 86-a).

Westchester had knowledge that Hartford was making a loan relying on the assignment of the passbook as security (Appendix, Pages 43-a to 46-a) and had executed the "Receipt of Notice" that it

... acknowledges that a copy of the above order for transfer has been filed with it

and reported the then present balance of \$38,265.00 (Exhibit 2; Appendix, Page 81-a).

Westchester's cover letter (Exhibit 3; Appendix, Page 82-a) has the bare reference that the account consists "of security rents under leases", but contains no statement that it would not or could not honor the transfer if there were a default on Hartford's loan.

At the trial, Westchester failed to introduce any testimony that the pledged monies were "security rents under leases". There was not one lease introduced into evidence. There was not a scintilla of evidence showing that one tenant had made claim to any

portion of the pledged monies. In fact, as stated above, at the conclusion of the trial, Westchester's counsel did not even know of any tenant who claimed said monies. (Appendix, Page 68-a).

The passbook raises further questions as to Westchester's characterization of "security rents under leases" since the account was not made up of various tenants paying security deposits "under leases", but one lump sum deposit made on one date, only two weeks before the account was pledged.

Westchester's witness further testified that the passbook was also devoid of any indication that any signature other than Herbert Stoll was required to make a withdrawal. (Appendix, Pages 66-a and 67-a).

The facts are abundantly clear that Hartford, prior to making a loan secured by the passbook, took all reasonable steps to ascertain that the passbook was assignable and that it was receiving good and adequate security for its loan. It called to Westchester's attention that it was relying upon the passbook as security for its loan; it gave notice to Westchester that it was making the loan based upon such reliance.

If Westchester had believed at that time that the passbook and the deposits it represented could not be assigned - were, in fact, fiduciary funds - all it had to do was to refuse to notify Hartford of the balance of the account and refuse to execute the Receipt of Notice or return it. Or, not having done so, all Westchester need to

have done instead of sending the innocuous cover letter of May 21, 1971, was to advise Hartford that it believed that the funds were trust funds and not subject to pledge.

POINT II

WESTCHESTER'S EXHIBITS A AND B ARE INADMISSIBLE

Westchester introduced, over Hartford's objections, Exhibits A and B, characterized as a savings account ledger card and a signature card kept by Westchester "in the regular course of business". (Appendix, Pages 88-a and 89-a).

Both these Exhibits contained typing in a different color than the other type referring to "RENT SECURITY ACCOUNT" (the signature card) and "WATCH RENT SECURITY ACCOUNT" and "COUNTERSIGNATURE OF MORTGAGE DEPT. REQUIRED NO WITHDRAWALS" (the ledger card).

Hartford, after conducting its voir dire, objected to the introduction of both exhibits as failing to come within the "Shop Book Rule". Rule 803, Federal Rules of Evidence; Section 52-180, Connecticut General Statutes; New York CPLR 4518. (Appendix, Page 63-a).

As the Court stated in United States v. Blake, 488 F. 2d 101 (C.A. 5, 1973), at page 105:

While the trial court does have wide discretion in determining the admissibility of documents as business records, ..., there must be minimal authentication proof to give them reliability.

Earlier, the Fifth Circuit had stated, also at page 105:

Liberal as we are to the fullest use of 28 U.S.C.A. Section 1732 [predecessor to Rule 803, FRE], there are two prerequisites both of which are to be demonstrated to permit admission of business records. First, [28 U.S.C.A. Section 1732] states that the offeror must establish that the records were kept in the regular course of business ... Secondly, testimony must be given by a custodian adequately authenticating the record's accuracy and explaining the efforts employed to ensure this accuracy.

Or, as stated by the same Fifth Circuit in 1974 in Reyes v. Wyeth Laboratories, 498 F. 2d 1264, cert. den. 419 U.S. 1096, in footnote 37 at page 1286:

Generally, testimony by the custodian or another qualified witness that the records offered were kept in the regular course of business and that they were prepared at or near the time in issue is a predicate to admission under Section 1732 (a).

Rule 803, FRE, retains the requirement that the records be "made at or near the time" of the entry and that "it was the regular practice of that business activity to made the ... record".

An examination of witness Hahn's testimony clearly shows that neither of these criteria was met.

The witness testified that he was neither in charge of nor had any responsibility for the exhibits at the time they were made (Appendix, Pages 62-a to 63-a); was not familiar with the exhibits or how they were handled at the time they were made, up to the time he first saw them (Appendix, Page 63-a); had no knowledge as to who made the entries in red (Appendix, Page 63-a); did not have any knowledge as to when the questionable entries were made (Appendix, Page 64-a);

and, readily admitted that if he were personally preparing the passbook (Exhibit 4; Pages 83-a to 86-a), the passbook would have contained the same restrictive language that appeared upon the questionable exhibits (Appendix, Page 66-a).

Assuming, arguendo, that the witness was the custodian of the exhibits, his testimony clearly indicated that he had no knowledge as to when the restrictive entries were made, nor was any explanation offered as to the failure of the records to follow the normal procedure of entering on a passbook any language of restriction or limitation that would appear on Westchester's internal records.

Without the admission of Exhibits A and B, the only evidence before the Trial Court in support of Westchester's contention that the use of the deposited funds were restricted and not subject to the depositor's pledge to Hartford was the minimal reference upon returning the executed Receipt of Notice, contained in the covering letter referring to "security rents under leases".

CONCLUSION

The monies on deposit with Westchester under the name of "Hyde Park Company c/o Herbert Stoll" were, in April, 1971, the property of the limited partnership, Hyde Park Company. Said monies were duly pledged to Hartford for security for a loan made by it to Hyde Park Company and became the property of Hartford. Said pledge was acknowledged by Westchester. Said monies were not fiduciary or

trust funds.

The decision of the Trial Court should be reversed and judgment be entered for the Plaintiff in the sum of \$44,219.84, with interest from the date of demand, July 18, 1974, together with costs.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HARTFORD NATIONAL BANK AND TRUST
COMPANY

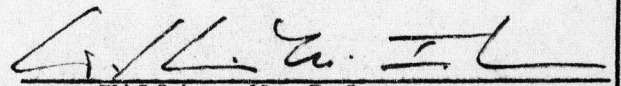
VS.

D.N. 77-7007

WESTCHESTER FEDERAL SAVINGS AND
LOAN ASSOCIATION

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a copy of the Brief
in the above entitled action was mailed on the 7th day of
February, 1977, to Victor N. Pacor, Esq., of Pacor & Del Vecchio,
56 Harrison Street, New Rochelle, New York 10801, attorney
of record for the Defendant, Westchester Federal Savings and
Loan Association, by United States Mail, postage prepaid.


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